

1       Stewart state something or what?

2               MR. SILBERMAN:  Yes, I mean, without having --  
3       without calling here -- she has been deposed.  Without  
4       calling her, I don't think that it is relevant to the issue  
5       before Your Honor, which is issue number one, the ex parte  
6       issue.

7               MR. EISEN:  Well, there is a predicate for that.

8               JUDGE CHACHKIN:  What is that?

9               MR. EISEN:  That he was troubled by the fact that  
10       a significant amount of money had been expended by Rainbow.  
11       So it's clear what Mr. Kreisman's perception was with regard  
12       to his being troubled.

13              JUDGE CHACHKIN:  Well, the parties have a right to  
14       cross-examine Ms. Kreisman.  If you want to make her  
15       available as a witness, then otherwise they have a right to  
16       object on the grounds of hearsay.  And an objection has been  
17       lodged against that portion.

18              I have difficulty understanding is she saying that  
19       Mr. Stewart said something, or how did she perceive he was  
20       troubled, whether it was a nod of the head, or what does  
21       that mean that he is troubled?  I don't know what that  
22       means, frankly.  It's not that Mr. Stewart said something,  
23       unless she appears as a witness and says what that means.

24              MR. SILBERMAN:  We have no objection --

25              MR. EISEN:  I would add that when the Commission

1 granted reconsideration in this case one of the bases for  
2 that consideration was the amount of money that Rainbow had  
3 expended.

4 MR. SILBERMAN: And that's in the record.

5 MR. COLE: Well, Your Honor, what does this have  
6 to do with whether or not Rainbow intentionally violated the  
7 ex parte rule?

8 MR. EISEN: Correct.

9 MR. COLE: Whether or not Mr. Stewart was told or  
10 not told, whether or not it had anything to do with the  
11 price of tea in China, it doesn't have to do with Rainbow's  
12 intent with respect to its violation of the ex parte rule.

13 JUDGE CHACHKIN: All right, the objections are to  
14 the sentence, "Mr. Stewart appeared troubled," and where it  
15 ends with "expenses," is that right?

16 MR. SILBERMAN: And the next sentence, "Indeed,  
17 neither had I been informed of that fact" is irrelevant.

18 JUDGE CHACHKIN: All right. It certainly has no  
19 relevance to the ex parte issue.

20 MR. SILBERMAN: It's not relevant to the ex parte  
21 issue. It's relevant maybe to her state of mind as to why  
22 the applications had been denied.

23 MR. EISEN: Part of the ex parte issue deal with  
24 the meeting that occurred on July 1, 1993, in which she has  
25 testified to in this affidavit.

1 MR. SILBERMAN: Correct.

2 MR. EISEN: And it seems to me that under those  
3 circumstances it is relevant. This specific issue relates,  
4 at least in part, to that meeting. What Ms. Kreisman says  
5 about what occurred at that meeting and her perceptions of  
6 that meeting I think are relevant, and I think both  
7 sentences that have been objected to are marginally relevant  
8 to what we are talking about.

9 JUDGE CHACHKIN: It seems to me in the first place  
10 that the contents of the meeting are irrelevant except  
11 insofar as they demonstrate that there was a discussion on  
12 the merits. The actual thing that was said is unimportant.  
13 All that is important is was this an ex parte content.

14 MR. EISEN: Yes, actually --

15 JUDGE CHACHKIN: That is all that's relevant.

16 MR. EISEN: Actually, it's what wasn't said at the  
17 meeting is most relevant.

18 JUDGE CHACHKIN: But the fact that Ms. Polivy  
19 disagreed with the denial of the extensions described as  
20 actions unfair indicates that it was -- that it was a  
21 discussion of the merits. It was not a status inquiry. And  
22 that's all that is relevant as far as I can see.

23 MR. EISEN: But why isn't these particular, these  
24 two sentences relevant under what you just said?

25 MR. EISEN: Well, what I am saying is all that's

1     necessary --

2             MR. EISEN:  It demonstrates it wasn't a status  
3     inquiry, something that we have never argued.

4             JUDGE CHACKIN:  All right.

5             MR. EISEN:  And I think those two sentences go to  
6     the heart of what you just observed.

7             JUDGE CHACKIN:  What, that he was --

8             MR. EISEN:  That he was troubled by the fact that  
9     a significant money had been expended by Rainbow  
10    Broadcasting Company.

11            JUDGE CHACKIN:  But that has nothing to do with  
12    the ex parte issue.

13            MR. EISEN:  It has to do with the merits.

14            JUDGE CHACKIN:  That's right.  There was a  
15    discussion of the merits.  There is no question about it.

16            MR. EISEN:  I thought you had just indicated that  
17    was part of the ex parte issue.

18            JUDGE CHACKIN:  It seems to me all that's  
19    necessary is it could have been stipulated that there was a  
20    discussion of the merits and then we didn't need any of this  
21    material, frankly, because that's all that is necessary.

22            All right, there has been a request to cross-  
23    examine Ms. Kreisman if you want to put in the sentences  
24    about her being troubled.  I don't think it's relevant to  
25    the issue of ex part.

1 MR. SILBERMAN: Excuse me, Your Honor We are not  
2 asking that Ms. Kreisman be produced. We just believe that  
3 there are portions of this that are relevant and there are  
4 portions that we believe are not relevant.

5 JUDGE CHACHKIN: And also, also, it appears to me  
6 that Ms. Kreisman has been deposed, and I don't understand  
7 why her deposition is not being introduced, which, I might  
8 add, would not raise any problems because based on my ruling  
9 I am sure it's been limited just solely to communications  
10 with the staff.

11 And I obviously understand why you are trying to  
12 put this affidavit it, because the affidavit goes far beyond  
13 my rulings.

14 MR. EISEN: But you have made your rulings  
15 particularly clear. And there are other reasons too. I  
16 mean, in terms of time reference this is a document which I  
17 think is important.

18 JUDGE CHACHKIN: Why?

19 MR. EISEN: The recollections of the affiants.

20 JUDGE CHACHKIN: Well, I haven't seen depositions,  
21 but there is no, as far as I know, I don't know if there is  
22 any vast differences between the information here and the  
23 information in the deposition. And I think the definition,  
24 frankly, where there was an opportunity to cross-examine  
25 these witnesses is far more probative than a mere affidavit

1 of Ms. Kreisman.

2 MR. EISEN: Well, it's under oath, you know.

3 JUDGE CHACHKIN: It may be under oath, but under  
4 the process of cross-examination many things are ferreted  
5 out that may not be available --

6 MR. EISEN: Under the Commission's ruling and your  
7 order in this case there wasn't a great deal to ferret out  
8 in these depositions.

9 JUDGE CHACHKIN: At least what was discussed there  
10 was the relevant portions, and here is an attempt to put in  
11 all kinds of extraneous material, and my inclination is not  
12 to let any of this in, frankly; not to let the affidavit in  
13 because most of it deals with irrelevant material, and there  
14 is a much better way to get evidence about the relevant  
15 portions, and that is by letting the depositions in. And I  
16 think that's going to be my inclination, not to accept any  
17 portions.

18 MR. EISEN: It's our burden --

19 JUDGE CHACHKIN: It may be your burden, and what I  
20 am saying to you is it's improper for you to attempt to put  
21 in this affidavit.

22 MR. EISEN: Why is it improper?

23 JUDGE CHACHKIN: Because it only contains one  
24 paragraph, possibly, of relevant material, and the remainder  
25 of the exhibit deals with irrelevant material. And

1 obviously if you wanted to put it in you should have  
2 introduced just this one paragraph.

3 MR. EISEN: No.

4 JUDGE CHACHKIN: But it seems to me since there is  
5 depositions my inclination is not to receive any portion of  
6 these affidavits. There is a better way -- unless they  
7 differ significantly with what was said in the deposition  
8 insofar the relevant portions are concerned.

9 If you want to put these witnesses on, you can,  
10 but I am not going to receive these affidavits. There is  
11 too much involved here which doesn't involve -- too much  
12 irrelevant material here and there is very little relevant  
13 material here, and a far better way to put in evidence of  
14 Ms. Kreisman and these other individuals without requiring  
15 them to testify would be to put in the depositions.

16 If you are unwilling to do so, unfortunately, I'm  
17 not going to receive these affidavits or any portions of it.  
18 So I am going to reject Rainbow Exhibit 2 in its entirety.

19 (The document referred to,  
20 having been previously marked  
21 for identification as Rainbow  
22 Exhibit No, 2, was rejected.)

23 JUDGE CHACHKIN: Put the depositions in if you  
24 want their relevant testimony on the issues.

25 Rainbow Exhibit 3, is there any objection to

1 Rainbow Exhibit 3?

2 MR. COLE: Yes, Your Honor, we have some.

3 MR. SILBERMAN: And we do too, so I believe Mr.  
4 Cole can go first.

5 JUDGE CHACHKIN: All right, go ahead, Mr. Cole.

6 MR. COLE: Your Honor, the first full text  
7 paragraph, that is, setting aside the, "I, Joseph Rey, under  
8 penalty of perjury hereby declare as follows." The  
9 paragraph following that --

10 JUDGE CHACHKIN: What is this now? What page?

11 MR. COLE: Where the declaration of Joseph Rey?

12 JUDGE CHACHKIN: Yes.

13 MR. COLE: It is in the first substantive  
14 paragraph, the third sentence which begins, "This  
15 declaration," or which reads in its entirety, "This  
16 declaration is submitted in order to show that RBC  
17 misrepresenting no facts to the Commission, was truthful and  
18 candid regarding its financial qualifications to construct  
19 and operate its television station as proposed," I would  
20 strike that as stating a conclusion, it's self-serving, and  
21 not probative of any issue.

22 JUDGE CHACHKIN: All right, what else do you  
23 object to?

24 MR. COLE: The next sentence in that paragraph,  
25 "To fully understand the facts and circumstances surrounding



1     our financial qualifications, some history of my involvement  
2     in this proceeding is necessary," that's irrelevant and  
3     nonprobative statement. I would take that out just to clean  
4     it up.

5             MR. EISEN: Are you taking argument on this point,  
6     Your Honor?

7             JUDGE CHACKIN: I just want to find out what the  
8     objections are. Then I will take arguments.

9             MR. COLE: On page 3 of this exhibit, the first  
10    two full sentences, "In return, I learned a great deal about  
11    start-up operations. I expect to use the knowledge I gained  
12    to someday acquire a broadcast station," I would strike that  
13    as irrelevant, or I object to that as irrelevant.

14            The next paragraph starting with the third  
15    sentence, "We recognize that there was no certainty in  
16    obtaining a construction permit through this proceed, but we  
17    also knew that success would cost far less than purchasing  
18    an existing station, and that a new television station would  
19    likely appreciate in value faster than one that had been  
20    purchased," I would strike that as irrelevant.

21            The next sentence, we have no objection to. But  
22    then the following sentence we would also object to as  
23    irrelevant, and that is, "I believe that this would allow me  
24    to gain experience in the construction and operation of a  
25    new television station, something I had never been involved

1 in before."

2 Moving over to page 6, the last sentence in the  
3 first --in the middle of the paragraph which is to say,  
4 "There was another tower side mountain spot at 1400 feet  
5 which remained available," I would strike that or object to  
6 that as irrelevant.

7 The final paragraph on page 6, running over to  
8 page 7, which begins, "After the Commission had granted the  
9 construction permit," and ends on the top of page 7, "that  
10 we had," I would object to that as irrelevant.

11 MR. EISEN: I'm sorry. Is that the entire  
12 paragraph?

13 MR. COLE: That would be that paragraph, yes, yes.

14 MS. POLIVY: Where did you start?

15 MR. EISEN: At the bottom of page 6.

16 MR. COLE: Starts at the bottom of page 6 and ends  
17 at the top of page 7.

18 On page 8, about half way down through the top  
19 run-over paragraph there is a sentence which reads, "The  
20 1400 foot spot would never have allowed for the placement of  
21 a signal over Clermont," and I object to that as irrelevant.

22 On page 10, the first paragraph beginning with,  
23 "Part of the reason," down to "loans from Howard Conant," I  
24 object to because it appears to be testimony of Mr. Rey --  
25 Rey's opinion or Rey's reading of the rationale to court

1 opinion which I believe speak for themselves. So I guess my  
2 objection would be characterized as competence, that I am  
3 not sure Mr. Rey is competent to tell us what a district  
4 court judge assumed or what the Court of Appeals decision  
5 appeared to have been based on, and I also question whether  
6 or not -- strike that. I will leave the objection there.

7 And then on page 12, the last paragraph, the  
8 second sentence, "Despite the setbacks that we have  
9 experienced in this case we have achieved that goal," I  
10 object to that as irrelevant. And the final two sentences  
11 of the exhibit, "We have now been on the air continuously"  
12 down through "licensee of Television Channel 65," I object  
13 to that as irrelevant.

14 JUDGE CHACHKIN: Mr. Silberman, do you have any  
15 additional objection?

16 MR. SILBERMAN: I would say on page 10 of the  
17 exhibit, the middle sentence, I don't know if Mr. Cole is  
18 objecting to the entire paragraph. We do not object to Mr.  
19 Rey's characterization of the Rey v. Gannett case. He says,  
20 "It wasn't intended to resolve whether or not we were  
21 entitled to injunctive relief." We have no object to that  
22 sentence.

23 The remainder of the paragraph is particularly  
24 objectionable because Mr. Rey is not qualified to give his  
25 testimony. There are two court opinions here, the remand

1 order of the D.C. Circuit and the District Court order, and  
2 they speak for themselves.

3 MR. COLE: Your Honor, I withdraw my objection to  
4 the one sentence that Mr. Silberman has pointed out, "It  
5 wasn't intended to resolve whether or not we were entitled  
6 to injunctive relief," I have no objection to that.

7 JUDGE CHACHKIN: So you don't object to the first  
8 two sentences preceding the sentence you object to?

9 MR. COLE: Pardon.

10 JUDGE CHACHKIN: You don't object to the --

11 MR. SILBERMAN: On page 10, the first paragraph,  
12 top of the page, we object to sentence one. We do not object  
13 to sentence two, that's okay. Of course, assuming that that  
14 case refers to Rey v. Gannett, and that's what he is  
15 referring to, and we do object to the third sentence of the  
16 paragraph.

17 JUDGE CHACHKIN: Anything else? Any other  
18 objections?

19 MR. SILBERMAN: We have no other objections.

20 JUDGE CHACHKIN: All right, Mr. Eisen, let's go.

21 MR. EISEN: Your Honor, I don't disagree with the  
22 analysis that counsel offered on page 10, the last sentence  
23 is a legal conclusion.

24 But the rest of those things that have been  
25 objected to I think had clear historic significance under

1 each of the issues.

2 JUDGE CHACHKIN: Well, we will take them up one at  
3 a time.

4 You are not opposing the objections on page 10,  
5 and agree that the only sentence that --

6 MR. EISEN: I think the last sentence arguably can  
7 be stricken.

8 JUDGE CHACHKIN: And what about the first  
9 sentence?

10 MR. EISEN: I think this is this potential  
11 witness's understanding of certain things that happened that  
12 underlie the issues.

13 JUDGE CHACHKIN: How is that relevant, his  
14 understanding of why the issue was --

15 MR. EISEN: That's an historical time frame.

16 JUDGE CHACHKIN: That's not historical background.  
17 He is -- he is attempting to, it seems to me, to interpret  
18 the court decision. I mean, his opinion is as relevant as  
19 anyone else's opinion.

20 MR. EISEN: You are probably right.

21 JUDGE CHACHKIN: The only thing that --

22 MR. EISEN: I would not oppose --

23 JUDGE CHACHKIN: Pardon?

24 MR. EISEN: -- the final sentence in that  
25 paragraph, but I would not --

1 JUDGE CHACHKIN: All right, so the only sentence  
2 on the first paragraph on page 10 that I will receive will  
3 be -- I don't know if it makes any sense, "That case, of  
4 course, was intended to resolve whether or not we were  
5 entitled to injunctive relief" is there something that can  
6 proceed --

7 MR. SILBERMAN: Your Honor, my suggestion would be  
8 that that could be adduced through Mr. Rey's oral testimony  
9 on that sentence, and that takes care of the matter.

10 JUDGE CHACHKIN: I think that's correct. So the  
11 entire paragraph will then not be received.

12 MR. EISEN: Well, wait, are you saying that there  
13 is a sentence there that counsel has not objected to?

14 JUDGE CHACHKIN: The sentence that was not  
15 objected to, "That case, of course, was intended" --

16 MR. EISEN: Right.

17 JUDGE CHACHKIN: You want to ask the witness --

18 MR. EISEN: Yes.

19 JUDGE CHACHKIN: All right, that one sentence will  
20 be allowed in. The remainder of the paragraph will not be  
21 received.

22 MS. POLIVY: Why not just say "the Florida  
23 District Court proceeding," which is what is -- refers to in  
24 the sentence that you have just taken out "was intended.  
25 Then we don't have to remember to go to the witness.

1 JUDGE CHACHKIN: What is this now?

2 MR. EISEN: Instead of "that case, of course,"

3 just say "the Florida District Court" --

4 JUDGE CHACHKIN: All right.

5 MR. EISEN: -- "proceeding was intended."

6 JUDGE CHACHKIN: All right. I will permit it to  
7 be modified.

8 MR. SILBERMAN: Excuse me. The sentence will  
9 read, "The Florida District Court proceeding --

10 MS. POLIVY: "...was intended."

11 MR. SILBERMAN: -- "was intended." All right.

12 JUDGE CHACHKIN: "...to resolve whether or not we  
13 were entitled to injunctive relief," that sentence will  
14 remain in. The rest of the paragraph will not be received.

15 JUDGE CHACHKIN: All right, let's go over the  
16 objections from the beginning.

17 The first objection is on page 1 to the portion  
18 beginning, "This declaration is submitted" to the end of the  
19 paragraph. And the objection is that it is not relevant, is  
20 that right, Mr. Cole?

21 MR. COLE: That's right, Your Honor. It states a  
22 conclusion and it's not probative.

23 MR. EISEN: Well --

24 MS. POLIVY: That's the reason why he's submitting  
25 the declaration.

1 JUDGE CHACHKIN: Well, only one person to speak at  
2 a time on behalf of the Applicant.

3 MS. POLIVY: It gives the reason that he is  
4 submitting the declaration, Your Honor, what his intention  
5 is in showing that. He is certainly entitled to state that,  
6 the first sentence.

7 The second sentence, it's his opinion that you  
8 have to look at all of these facts and circumstances  
9 surrounding his financial qualifications, and it's a  
10 prefatory sentence to saying that -- to introducing the  
11 history of being involved in the proceeding. I mean, I  
12 don't see anything that's objectionable about it.

13 MR. EISEN: It's certainly not offering --

14 JUDGE CHACHKIN: Well, wait a minute. Only one  
15 person can speak in connection with this exhibit. Either  
16 you, Mr. Eisen, or Ms. Polivy. We are not going to have  
17 this --

18 MR. EISEN: I understood you to mean --

19 MS. POLIVY: At a time.

20 JUDGE CHACHKIN: No, no, not at a time.

21 I said if Mr. Eisen is going to do it, then let  
22 Mr. Eisen.

23 MR. EISEN: I understand, Your Honor.

24 JUDGE CHACHKIN: All right.

25 MS. POLIVY: Is that going to hold true for the



1 Bureau and Mr. Cole as well?

2 JUDGE CHACHKIN: Well, there is only one person  
3 here on behalf of the Bureau.

4 MS. POLIVY: Well, there is only one person here  
5 on behalf of Rainbow Broadcasting, Your Honor, and we are  
6 both parties.

7 MR. EISEN: That is true.

8 At your request, Your Honor.

9 JUDGE CHACHKIN: Yes, yes.

10 All right. Well, I will overrule the objection to  
11 the statements on the first page with the understanding that  
12 this is not being offered for the truth. This is merely a  
13 statement of the party as to what he intends to show, but  
14 it's not being offered for the truth, it's not being  
15 received for the truth.

16 MR. COLE: I understand, Your Honor.

17 JUDGE CHACHKIN: All right. The next objection --

18 MS. POLIVY: Would be --

19 JUDGE CHACHKIN: -- is page 3.

20 MS. POLIVY: To the objections on page 3, one of  
21 the things that is relevant to the issues in this  
22 proceeding, particularly the question of the financing, is  
23 the relationship of Mr. Rey and Mr. Conant, and the  
24 background of the situation, all of that goes to the  
25 background of Mr. Rey regarding the industry. Was he just

1 somebody who just happened in off the street who somebody  
2 gave \$4 million to? Was he a person that had a background,  
3 that had experience, that he knew what he was doing? And  
4 he's entitled to show that.

5 JUDGE CHACKIN: I will receive it for background  
6 purposes. And certainly you can cross-examine him on  
7 anything he says.

8 MR. COLE: All right, Your Honor.

9 JUDGE CHACKIN: And now the next one is on page  
10 6. Now, as far as that sentence is concerned, that's  
11 irrelevant to the issues. It has no bearing on the issues.  
12 I will not receive that one sentence about the lower side  
13 mountain spot.

14 MS. POLIVY: Your Honor, it relates to the tower  
15 proceeding that is directly in issue with respect to issue  
16 number three.

17 JUDGE CHACKIN: The fact that there was a lower  
18 spot --

19 MS. POLIVY: Yes, Your Honor. That was very much  
20 the point of the matter; that there was -- that Rainbow had  
21 for five years been paying rent to have the 1500 foot slot.  
22 They knew there was a 1400 foot slot, and suddenly somebody  
23 comes in to take a lease on the 1500 foot slot. That is  
24 certainly relevant to the background of the whole issue in  
25 what was involved in the Florida proceedings, and what was

1     meant when the Court said nobody could do anything, what the  
2     effect of that was, and Mr. Rey is here and can testify to  
3     it.

4             JUDGE CHACHKIN:   Mr. Cole?

5             MR. COLE:   Your Honor, I still don't understand  
6     what there is that's relevant notwithstanding Ms. Polivy's  
7     characterization of the history of the case.   I don't  
8     understand what this sentence has to do with anything.   I do  
9     not see the relevance of whether or not there was a -- one,  
10    two, three, four, five 10 different spots on the tower.   So  
11    what?   How does that relate in any way to any of the issues  
12    in this case?

13            JUDGE CHACHKIN:   Since Rainbow wasn't proposing to  
14    use that how is that --

15            MS. POLIVY:   Your Honor, the problem was that  
16    Rainbow --

17            JUDGE CHACHKIN:   Well, the litigation --

18            MS. POLIVY:   -- the reason for the litigation.

19            JUDGE CHACHKIN:   Well, we are not getting into the  
20    litigation.   That's not an issue in this case, the fact that  
21    there was litigation going on.

22            MS. POLIVY:   Yes, it was, Your Honor, because --

23            JUDGE CHACHKIN:   Well,

24            MS. POLIVY:   -- the issue itself is did we  
25    misrepresent that litigation somehow to the Commission.

1 JUDGE CHACHKIN: I don't see what bearing it has,  
2 the fact that there was another spot available has any  
3 bearing on any representations that were made. It wasn't  
4 something that Rainbow was proposing to use.

5 MS. POLIVY: No, it was something that they were  
6 proposing that the person who was suddenly in there, in  
7 their slot was proposing to use, and that was the reason for  
8 the suit.

9 I mean, certainly you wouldn't say that Mr. Rey  
10 couldn't testify to that. What was the reason for the  
11 lawsuit? And he explains it, and if it's relevant when he  
12 testifies, it has to be relevant in the exhibit.

13 JUDGE CHACHKIN: Well, that's another thing. Is  
14 Mr. Rey going to testify on direct concerning all these  
15 matters, or what is the purpose of this exhibit?

16 Does this constitute Mr. Ray's direct testimony or  
17 what is it?

18 MR. EISEN: No, it doesn't. This addresses the  
19 financial misrepresentations.

20 JUDGE CHACHKIN: So he is not going to testify as  
21 to that?

22 MR. EISEN: He may. There may be matters raised  
23 by testimony that he gives and it will implicate some of the  
24 matters in this exhibit.

25 MS. POLIVY: And certainly it's available for

1 cross-examination.

2 MR. EISEN: Yes, that's the point.

3 JUDGE CHACHKIN: Well, I mean it seems to me  
4 either put a man on direct to testify or you offer his  
5 written testimony and then the parties cross-examine.

6 But what is this? I don't -- on some issues or  
7 all issues, or what?

8 MR. EISEN: No, this relates only to the financial  
9 misrepresentation issue, although there are things that was  
10 submitted purposely to address the financial  
11 misrepresentation issue. As Your Honor knows there is an  
12 exhibit to the motion for summary decision that Rainbow  
13 Broadcasting Company filed.

14 JUDGE CHACHKIN: Yes.

15 MR. EISEN: And that was the issue in question  
16 when it was filed, but there are matters, especially  
17 background matters in here, that I believe are relevant that  
18 we have already addressed, that I think have to be adduced  
19 in this record.

20 JUDGE CHACHKIN: Well, I am not at this point  
21 ruling whether it should be adduced or not. The question is  
22 do you propose to have him testify fully as to matters which  
23 are contained in this exhibit or just what?

24 MR. EISEN: The answer is yes. He will  
25 undoubtedly testify as to regard to the matters in this

1 exhibit.

2 JUDGE CHACHKIN: So what is the purpose of this  
3 exhibit?

4 I mean, either you put his direct testimony orally  
5 or in written form. You can't have it both ways.

6 MR. EISEN: I understand. You asked for written  
7 summaries, brief written summaries.

8 JUDGE CHACHKIN: But you are not offering this as  
9 a summary. You are offering this --

10 MR. EISEN: I am offering it as an exhibit.

11 JUDGE CHACHKIN: Yes.

12 MR. EISEN: That's correct.

13 MR. EISEN: We thought it would conserve time. We  
14 thought it would be a shorthanded way to --

15 JUDGE CHACHKIN: But it's --

16 MR. EISEN: -- provide notice to the parties and  
17 to you with regard to what we believe is our burden in this  
18 case and how we can meet it.

19 JUDGE CHACHKIN: I understand that. But how is it  
20 going to save -- it seems to me it's going to confuse things  
21 because if he is going to go over the same matters covered  
22 here, it's only going to confuse things because then you  
23 will have to use this as well as his oral testimony in  
24 questioning him. So it seems to me you have to make a  
25 choice as to whether you want to put Mr. Rey on orally to

1     testify on the matters covered in this exhibit or whether  
2     you want to put in this written exhibit and have him proceed  
3     to cross-examination.

4             MR. EISEN: Okay, you have raised an interesting  
5     and a significant problem.

6             Can we recess for a moment to confer?

7             JUDGE CHACHKIN: Sure. Off the record.

8             (Whereupon, a recess was taken.)

9             JUDGE CHACHKIN: Back on the record.

10            Mr. Eisen, it is now decision time.

11            MR. EISEN: It is a heavy burden you place upon  
12     us.

13            I think our decision is that we would at this  
14     point withdraw the exhibit of Mr. Rey and put him on direct  
15     examination.

16            JUDGE CHACHKIN: All right.

17            MR. SILBERMAN: May I ask a question, Your Honor?

18            JUDGE CHACHKIN: Yes.

19            MR. SILBERMAN: The exhibit that that comprises  
20     the declaration of Mr. Rey, and also there is excerpts of  
21     the transcript of the hearing before Judge Marcus in Rey v.  
22     Gannett, are you withdrawing that as well, or are you going  
23     to offer that into evidence?

24            MR. EISEN: No, we are withdrawing the entire  
25     exhibit.

1 MR. SILBERMAN: Okay.

2 JUDGE CHACHKIN: All right. Rainbow Exhibit 3,  
3 which had been previously identified has been withdrawn.

4 (The document referred to,  
5 having been previously marked  
6 for identification as Rainbow  
7 No. 3, was withdrawn.)

8 JUDGE CHACHKIN: Exhibit 4 again is with Mr.  
9 Conant.

10 What is your position there?

11 MR. EISEN: Well, you raised an interesting  
12 problem in this process and exhibits, and I am glad that  
13 it's raised because it also is -- we requested Mr. Conant's  
14 declaration be put into the record and he be cross-examined  
15 on that.

16 Mr. Conant is in his seventies. He is not well.  
17 He is coming in to testify this afternoon. It is crucial  
18 that he go back to Chicago, and I think if we cross-  
19 examination on the basis of his declaration and not go  
20 through direct examination, it will make that likelihood far  
21 greater.

22 JUDGE CHACHKIN: So you are going to go ahead with  
23 his declaration?

24 MR. EISEN: Yes.

25 JUDGE CHACHKIN: I will permit you if you want to



1 supplement it with additional questions, but not to go over  
2 the same material.

3 MR. EISEN: I understand that.

4 JUDGE CHACHKIN: All right. So we do have Rainbow  
5 Exhibit 4 has been offered.

6 Any objection to that?

7 MR. COLE: I have no objection, Your Honor,  
8 except, and this is not a question of objection, it's just  
9 an observation. The first full paragraph on page 2, the  
10 fourth sentence reads, "I am attaching a copy of my  
11 financial statement both prior to the sale to Interstate  
12 Steel Company and after the consummation of that sale."

13 My copy doesn't have any attachment. I assume  
14 when this was originally exchanged as an attachment to  
15 Rainbow's motion for summary decision a couple of months ago  
16 did have the attachments. I assume that this is just a  
17 carryover from that, and we can probably delete that  
18 sentence as inaccurately describing the exhibit.

19 MR. EISEN: Yes, absolutely.

20 MR. COLE: Okay.

21 JUDGE CHACHKIN: Okay, so which sentence is that?

22 MR. COLE: The sentence in the first full  
23 paragraph on page 2, about three sentences in, four  
24 sentences in, which reads, "I am attaching a copy of my  
25 financial statements both prior to and after consummation."